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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

RICHARD D. CARTER, Plaintiff and Appellant, v. FARMERS INSURANCE GROUP, INC. et al., Defendants and Respondents.	B297020 (Los Angeles County Super. Ct. No. SC127929)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig D. Karlan, Judge. Affirmed.

Richard D. Carter, in pro. per.; Carter Sands and Eugene P. Sands for Plaintiff and Appellant.

Tharpe & Howell, Christopher S. Maile and Eric B. Kunkel for Defendants and Respondents.

Appellant Richard Carter bought car insurance from respondents Farmers Group, Inc., (FGI) and Farmers Insurance Exchange (FIE) (collectively Farmers). Farmers charged his credit card twice for a premium payment and then refused to refund the payment within 24 hours of being notified of the overcharge. Instead, Farmers refunded the full amount within two weeks. Carter sued Farmers and now appeals from the judgment of dismissal entered after the trial court sustained a demurrer to Carter's First Amended Complaint (FAC) without leave to amend. Carter alleged causes of action for conversion, unfair competition, and breach of fiduciary duty.

Carter lists 10 separate claims of error. Some of these claims are duplicative and others are not directed at the trial court's actual ruling sustaining the demurrer. We summarize the relevant claims. With respect to the conversion cause of action, Carter contends the trial court erred in finding 1) the safe harbor provision of the Credit Card Act (Act) (Civ. Code, § 1747 et seq.)[1] applies to respondents; 2) a cause of action for conversion cannot be based on an overcharge as a matter of law; and 3) Carter did not suffer any damages or injury from the duplicate charges. With respect to the unfair competition cause of action, Carter contends the trial court erred in finding 1) he lacked standing to bring the unfair competition cause of action because he had not suffered any injury; and 2) even if the acts alleged in the cause of action were not unlawful, they were unfair and so could support the cause of action. Carter states briefly that his breach of fiduciary cause of action is also viable. We affirm the judgment.

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[1] Further undesignated statutory references are to the Civil Code.

BACKGROUND

Carter filed his original complaint for conversion and unfair competition against FGI alone. FGI answered. Carter filed an amendment to the complaint identifying a doe defendant as FIE. FIE is a reciprocal or inter-insurance exchange, and FGI is FIE's attorney-in-fact. FGI billed for and collected premiums for FIE.

FIE demurred. Carter filed a motion for leave to file the FAC, which, among other changes, added a new cause of action for breach of fiduciary duty.

The parties intended that FIE's demurrer and Carter's motion to file his FAC would be heard on the same day. Due to scheduling difficulties, only the demurrer was heard on December 18, 2018. The trial court sustained the demurrer with leave to amend.

Carter filed the FAC, which had been the subject of his motion for leave to amend. While Carter was entitled to amend his two existing causes of action in response to the court's ruling on the demurrer, he never obtained a ruling on his motion to file an amended complaint containing the additional cause of action for breach of fiduciary duty.

Both respondents demurred to the FAC. The demurrers were sustained without leave to amend.

Because the trial court sustained the demurrers without leave to amend, the facts of this case are those set out in the FAC (*Moore v. Conliffe* (1994) 7 Cal.4th 634, 638 (*Moore*) [in setting forth the relevant facts for purposes of appellate review, we treat all material facts properly pled as true].)

Carter alleged he had maintained automobile insurance with Farmers for three of his vehicles since 1991, and Farmers encouraged its insureds to "pay premiums [online]." Carter set up an online account "to track premium payment due dates and to pay online."

On August 6, 2014, the premium on a policy covering two of Carter's automobiles was due. The full amount due to pay the premium was $1,025.71. That same day, the premium for a policy on a third automobile was also due; the full amount due to pay that premium was $119.74.

On August 6, 2014, Carter paid the $1,025.71 and $119.74 premiums online through Farmers. Carter used a Mastercard issued by Wells Fargo Bank. Although Carter's choice of terminology tends to obscure this fact, the proceedings in this matter show that the Mastercard was a credit, not a debit, card.[2]

On August 11, 2014, Carter reviewed his online Mastercard account with Wells Fargo and discovered that the account had been debited on August 7, 2014 in the amounts of $1,025.71 and $119.74 for payments made to Farmers. These debits duplicated those he had authorized in the same amounts on August 6, 2014. Carter had not authorized the payments made on August 7, 2014.

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[2] Although Carter does not clearly allege that the Mastercard was a credit card, he later alleges that the "credit balance" on his Mastercard account was "an intangible property right." He has never claimed that the Mastercard was a debit card.

Carter called Farmers and spoke with a representative who acknowledged that the double payment was their error. Carter asked the representative "to immediately credit his account in the amounts that it had . . . misappropriated from his Wells Fargo account." The representative replied that his account would be credited in due course. Carter alleged Farmers had "a written policy whereby it holds refunds from 7–14 days." He also alleged Farmers had the ability to issue a refund the next business day.

On August 14, 2014, Farmers credited Carter's Mastercard account for in the amount of $119.74.

On August 19, 2014, Carter reviewed his Wells Fargo account and saw Farmers had credited his Mastercard account in the amount of $944.15 (rather than the full remaining amount of $1,025.74). On August 20, 2014, Carter called Farmers to inquire about this discrepancy, but its representative was unsure of the reason for it. Carter asked that the remaining $86.66 be immediately returned to his account. Later that day, Carter received an email from Farmers acknowledging that a double payment was applied to his account in error. The email explained that Farmers had retained $86.66 because it erroneously believed that Carter had not provided it with a required mileage form. However, on August 21, 2014, Farmers credited the $86.66 to Carter's account.

In his first cause of action, Carter alleged respondents misappropriated $1,025.71 and $119.74 from his account and that the credit balance on his Mastercard constituted "an intangible property right." Farmers converted that intangible property right by "invading" the balance. Carter alleged three acts of conversion: the initial act of misappropriation, the refusal

to immediately credit the monies back to his account, and the withholding of $86.66 until August 21, 2014.

In his second cause of action for unfair competition in violation of former Business and Professions Code section 17200, Carter alleged four acts: the three acts of conversion and a failure to disclose a premium. Carter alleged Farmers's initial "position" that it was entitled to retain $86.66 for Carter's failure to return his mileage form constituted the undisclosed premium.

Carter also alleged a third cause of action for breach of fiduciary duty, stating that as the attorney-in-fact for FIE, FGI owed him a fiduciary duty with regard to the insurance contracts executed on his behalf, a duty which required FGI to immediately return the amount of the duplicate charges. Carter, however, never obtained leave of court to add this cause of action.

DISCUSSION

A demurrer tests the legal sufficiency of the complaint. On appeal, "our standard of review is de novo, i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law." (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.) We give "the complaint a reasonable interpretation, and [treat] the demurrer as admitting all material facts properly pleaded." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966–967 (*Aubry*).) We do not, however, assume the truth of " 'contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' " (*Moore*, *supra*, 7 Cal.4th at p. 638.) Although we treat properly pled material facts as true, "we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

"The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Aubry, supra*, 2 Cal.4th at p. 967.)

I. *The Trial Court's Ruling on Conversion*

The trial court found Carter had alleged "nothing more than a simple overcharge, i.e., [Carter] was erroneously double-charged for his premium." The court emphasized that by plaintiff's "logic, every erroneous but refunded credit card charge would give rise to tort liability." The court explained "Civil Code section 1747.60 requires retailers to correct credit card billing errors within 60 days, and a retailer is 'every person other than a card issuer who furnishes money, goods, services, or anything else of value upon presentation of a credit card by a cardholder.' (Civ. Code, § 1747.02, subd. (e).) Again, FGI refunded the entire amount within two weeks."

Carter claims on appeal that the first time he "learned that Farmers was operating within a 60-day safe harbor was in the trial court's written ruling sustaining the demurrer to the FAC without leave to amend." He further claims that he had no opportunity to explain to the trial court why section 1747.60 did not apply.

This is not accurate. Respondents cited section 1747.60 in their demurrer. Carter thus was aware of and had the opportunity to address the applicability of that section in his opposition to the demurrer but did not do so, as respondents pointed out in their reply.

Carter's inaccurate summary of proceedings in the trial court is not helpful. Nevertheless, the general rule is that an appellant may present a new legal theory for the first time on appeal from the trial court's sustaining of a demurrer without leave to amend. (*B & P Development Corp. v. City of Saratoga* (1986) 185 Cal.App.3d 949, 959 ["An appellate court may also consider new theories on appeal from the sustaining of a demurrer to challenge or justify the ruling."]; see *Connerly v. State of California* (2014) 229 Cal.App.4th 457, 464.) We consider and reject Carter's belated claims that the Credit Card Act does not apply because, as we discuss in more detail below, this issue is dispositive of the conversion cause of action.

II. *The Safe Harbor Provision of Section 1747.60 Defeats the Cause of Action for Conversion.*

Carter contends he alleged respondents "without Carter's consent or authorization, accessed his credit card balance and transferred $1025.74 and $119.15 to its bank account . . . [and] the trial court was required to accept this allegation as true." He further contends he did not allege there was a "dispute over a charge" and as a matter of law under the facts of the FAC, there was no "overcharge." He also contends that an overcharge can only occur if the cardholder makes willing use of his credit card.

Carter made many allegations about the transfer of money in addition to the "misappropriation" restated in his brief. We read the complaint "as a whole and its parts in their context."

(*Blank v. Kirwan, supra,* 39 Cal.3d at p. 318.) As we have set forth in our discussion above, Carter's general factual allegations show a dispute over a charge to his Mastercard credit card.

"The Credit Card Act was enacted in 1971 to 'impose[ ] fair business practices for the protection of the consumers.' (*Young v. Bank of America* (1983) 141 Cal.App.3d 108, 114 [190 Cal.Rptr. 122].) It made 'major changes in the law dealing with credit card practices by prescribing procedures for billing, billing errors, dissemination of false credit information, issuance and unauthorized use of credit cards.' (Sen. Song, sponsor of Sen. Bill No. 97 (1971 Reg. Sess.) enrolled bill mem. to Governor Reagan (Oct. 12, 1971) p. 1.)" (*Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 534.) Thus, the Act is concerned with the means of payment used, not the subject of the transaction. Carter has not provided us, nor are we aware of, any authority or reason to exclude insurance policies purchased by consumers by way of credit card transactions.

Carter challenges the application of the Credit Card Act to his lawsuit on two grounds: he argues FGI and FEI are not "retailers" and the error here is not a "billing error" within the meaning of the statute. In discussing definitions under the Credit Card Act, Carter treats FIE and FGI as separate entities, arguing that neither one is a retailer who made a billing error. Ultimately, and confusingly, he discusses FIE first and then states that, for the same reasons, FGI is not a retailer.

The FAC alleges Carter presented his card to FGI for payment for his insurance and FGI accessed his account. FGI did so as the agent of FIE, and so if FGI is not liable FIE cannot be liable. Accordingly, we consider whether FGI meets the definition of a "retailer" who made a "billing error."

1. "Billing Error"

Carter's proposed interpretation of the terms "billing error" and "retailer" focuses on his claim that his authorization to FGI to use his credit card was limited to August 6, 2014 only, yet FGI, without his authorization, used the card again on August 7, 2014. Carter characterizes the duplicate set of charges as an invasion of his "intangible property rights." Carter's characterization is a contention, deduction and conclusion of law, which we are not required to accept. (*Moore*, *supra*, 7 Cal.4th at p. 638.) In common usage, payments made by credit card are called charges, and Carter's allegations as a whole show a "dispute over a charge."

The Credit Card Act defines a "billing error" by a retailer as simply "[a]n error by omission or commission in . . . posting any debit or credit." (§ 1747.02, subd. (j).) Relying on "Investopedia," Carter claims that "credit card posting is part of the clearing and settlement process that occurs when a cardholder *uses their card* for a transaction." He claims that since he did not "use" his credit card on August 7, 2014, no "posting" of the second set of debits/charges occurred, and so those charges cannot be billing errors. Investopedia appears to be a website of unproven reliability which has no value in interpreting long-standing California statutes.

First, this argument is absurd. The very essence of a duplicate charge is that it is never authorized, regardless of when the card was actually presented to the retailer for use. Second, "posting" is not a defined term under the Credit Card Act. We therefore look to the word's plain meaning, as found in standard dictionaries. (*Mt. Hawley v. Lopez* (2013) 215 Cal.App.4th 1385, 1396; *Merced Irrigation Dist. v. Superior Court* (2017)

7 Cal.App.5th 916, 926–927.) We agree with respondents that the dictionary definition most appropriate for "posting" as used in the Act is "to make transfer entries in." (Merriam-Webster Dict. (2020) <https://www.merriam-webster.com/dictionary/post> [as of July 13, 2020], archived at <https://perma.cc/3PKQ-CGC2>.) This definition has no temporal associations or other limitations. Nothing in the language of subdivision (j) adds a temporal limitation to posting, nor does the structure or purpose of the Act suggest that an error in posting a debit to a customer's credit card account cannot be deemed a "billing error" unless the error in posting occurs simultaneously with the cardholder's actual "use" of that card.

2. "Retailer"

The Credit Card Act defines a retailer as a person other than a card issuer who furnishes "goods, services or anything else of value upon presentation of a credit card." (§ 1747.02, subd. (c).) Carter contends he did not "present" his credit card on August 7, 2014, so FGI was not acting as a retailer when it made the duplicate charges on that date. This is simply a variation of Carter's previous argument that a billing error must occur simultaneously with or on the same calendar day that as the cardholder's presentation or use of his credit card. Neither the structure nor purpose of the Act suggests it imposes such a temporal limitation on billing errors. We agree with respondents that FGI is a retailer because it allowed its customers to pay their premiums with credit cards and then furnished a thing of value, insurance coverage.

Carter relatedly contends FGI is not a retailer because it did not furnish "goods, services, or anything else of value"[3] for the second set of charges on August 7, 2014; Carter's insurance had already been renewed in exchange for the first set of charges on August 6, 2014. Carter's interpretation would mean that errors involving duplicate charges or double billing would never fall under the Act, because no card holder receives anything of value for a duplicate billing. Nothing in the text of the Credit Card Act suggests such an arbitrary limitation on billing errors, particularly since it would arise indirectly as a result of a limited definition of "retailer" rather than as a result of the definition of "billing error."

In his reply brief, Carter contends for the first time FGI never provided anything of value because it was not an insurer and so could not have provided insurance. He has forfeited this claim by failing to raise it in his opening brief and by failing to provide even minimal legal or factual support for his claim in his reply brief. (*United Grand Corp. v. Malibu Hillbillies, LLC* (2019) 36 Cal.App.5th 142, 158 [appellate court does not normally consider issues raised for first time in reply brief]; *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 [claim not supported with reasoned argument and citations to legal authority deemed waived].) We note briefly, however, that nothing in the definition of "retailer" indicates that the person who furnishes a good, service or thing of value must be the exact same person to whom the cardholder presents his credit card. In a typical large store retail transaction, for example, a corporation

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[3] Carter claims insurance is not a good, and may well not be a service either. Carter does not appear to dispute, however, that insurance is a "thing of value."

owns and thus furnishes the goods in the store to the customer but the customer pays for the goods by presenting his credit card to an employee of the corporation who is acting on behalf of the corporation. That is analogous to what happened here: Carter presented his credit card to FGI who was acting on behalf of FIE, the furnisher of the insurance.[4]

Finally, Carter argues for the first time that he never sent an inquiry by mail to FGI and so the provisions of the Act do not apply. This issue, too, is forfeited.

Because we conclude the safe harbor provision of section 1747.60 supports the trial court's ruling sustaining the demurrer without leave to amend, we do not address appellant's other arguments about the conversion cause of action.

III. *The Cause of Action for Unfair Competition Cannot Be Based on the Piecemeal Refund of the Duplicate Charges.*

The court sustained the demurrer to the second cause of action for unfair competition (UCL) on the ground that Carter had failed to allege facts "showing [he] actually lost money or property from the alleged unfair competition" as required by Business and Professions Code section 17204. "Additionally, the

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[4] Carter provides no discussion of insurance law on this point, but we note FGI is alleged to be an attorney-in-fact for a reciprocal insurance exchange; such an attorney-in-fact is regulated under the Insurance Code and can be empowered by the subscribers' agreement " 'not only to exchange insurance contracts for the subscribers, but also to exercise *all* other functions of an insurer.' " (*Delos v. Farmers Group, Inc.* (1979) 93 Cal.App.3d 642, 652.) Thus it is not clear whether FGI itself could be understood as furnishing insurance under Carter's subscriber's agreement.

Court is unwilling to extend liability under Business and Professions Code section 17200 to these facts, given that doing so would create UCL liability to any retailer that accidentally double charges a customer, even if the retailer were to refund the money immediately."

Business and Professions Code section 17200 prohibits unfair competition, which is "any unlawful, unfair or fraudulent business act or practice."

Carter contends that "conversion is unlawful and if this court finds that a cause of action for same has been alleged in the FAC, the UCL count will stand." As we have explained, Carter has not stated a cause of action for conversion. Thus, the three alleged acts of conversion cannot support the unfair competition cause of action.

Carter alleged a fourth "unlawful" act: Farmers's initial position that it was retaining the $86.66 to cover an increase in premium due to Carter's failure to return a mileage form for one his vehicles. Carter contends Insurance Code section 381, subdivision f) mandates that a premium must be stated in a policy and Insurance Code section 383 makes failure to comply with section 381, subdivision (f) a misdemeanor. He alleged Farmers unlawfully and unilaterally increased his insurance premium without first disclosing the amount of the increase and the reason therefor – its non-receipt of the required mileage form.

The duplicate charges had nothing to do with an increase in premiums. Indeed, Carter alleged he had supplied the required form, so the error was just that – a billing error. Whatever Farmers's "position may have been about its two or three day delay in refunding a small portion of the erroneous charges, it is undisputed it did refund all of the duplicate charges to Carter

within two weeks of the billing error and well within the 60-day safe harbor period. Farmers complied with the requirements of the Act and is not liable for its brief retention of a portion of the duplicate charge for a few days regardless of its reasons for that retention. The unfair competition cause of action cannot be premised on Farmers's lawful piecemeal refund of the duplicate charges by relabeling it an unlawful premium increase.

Carter argues a new theory of unfair competition on appeal, claiming respondents had a duty under Insurance Code sections 330 and 332 to communicate with him about various aspects of the duplicate charges. These sections are found in Division 1, Part 1, Chapter 3 of the Insurance Code, which is entitled "Negotiations Before Execution." They are part of a statutory scheme which requires " 'full disclosure at the inception of the insurance contract and grant[s] a statutory right to rescind based on concealment or material misrepresentation at that time.' " (*Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 76.) Carter had renewed his insurance before the duplicate charges were made, and he does not explain how a failure to communicate after renewal about duplicate charges could have had any bearing on his already completed decision to renew. This theory cannot save the unfair competition cause of action.

Carter further contends that even if respondents' acts are not unlawful, they are unfair within the meaning of the UCL. Carter alleged that respondents' four acts were "both an unlawful and an unfair business practice." He alleged three of the acts were unlawful acts of conversion and one a misdemeanor violation of the Insurance Code. He did not, however, allege any

facts showing that these acts were "unfair" within the meaning of the UCL.

As Carter points out, in consumer cases under the UCL a business practice is unfair if (1) the consumer injury is substantial; (2) the injury is not outweighed by any countervailing benefits to consumers or competition; and (3) it is an injury that consumers themselves could not reasonably have avoided. (*Camacho v. Automobile Club of Southern California* (2006) 142 Cal.App.4th 1394, 1403.)

Carter contends there "is nothing in the FAC that has established that the consumer harm alleged is not 'substantial' or otherwise outweighed by countervailing benefits provided by Farmer[']s conduct." Carter has it backwards: he was required to allege facts showing that respondents' conduct was unfair, including that any injury is not outweighed by a countervailing benefit to consumers. He may argue this as a new theory on appeal, but he is required to show that there is "a reasonable possibility" that he can allege facts to support this theory and cure the defect in his pleading. (See *Aubry*, *supra*, 2 Cal.4th at p. 967; *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1163 [plaintiff has the burden of establishing he could amend to cure defect].) He has not made such a showing.

Respondents complied with the Credit Card Act, which was enacted to protect consumers. Even assuming a consumer suffers some injury from billing errors, by enacting the Credit Card Act, the Legislature has necessarily determined any injury suffered within 60 days of the error is outweighed by the countervailing benefit of the safe harbor provision, which gives retailers an incentive to correct billing errors in a timely manner.

IV. The Cause of Action for Breach of Fiduciary Duty is Unauthorized.

As we set forth above, Carter did not obtain leave of court to add his third cause of action for breach of fiduciary duty. He was required to do so. (*Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023.) There is an exception to this rule when "the new cause of action directly responds to the court's reason for sustaining the earlier demurrer. (*Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1015.) The exception does not apply here. Accordingly, the trial court properly sustained the demurrer to this cause of action. (*Harris*, at pp. 1022–1023.)

V. Miscellaneous Claims

Carter makes several meritless contentions, which we need not address in detail.

Carter contends Insurance Code section 481.5, which allows insurers 25 days to refund premiums to insureds, does not apply to the facts of this case. Although respondents referred to this section in their demurrer, the trial court did not in any way rely on this section to sustain the demurrer.

Carter contends the trial court concluded that his three causes of action could not be stated because Farmers "accidentally" double charged Carter. He contends intent is not relevant to these causes of action. It is not reasonable to understand that the trial court concluded as a matter of law that respondents "accidentally" double charged Carter. The court repeatedly used the word "erroneous" when discussing respondents' double charge. The court used the phrase "accidentally" only once, when it noted that Carter's theory would extend "UCL liability to any retailer that accidentally double

charges a customer, even if the retailer were to refund the money immediately."

Carter contends he has alleged "an identifiable trifle of an injury" and so has standing under the UCL. We have not based our affirmance of the demurrer on lack of standing, due to lack of injury or otherwise.

Carter contends the trial court erred in finding that respondents were "absolved" of their tortious conduct because they " 'refunded the entire sum [converted] within two weeks.' " Carter does not provide a citation to the record for this "finding." We do not conclude the trial court found respondents committed tortious conduct but were absolved of it. We certainly have not affirmed the trial court's ruling on that ground.

DISPOSITION

The judgment is affirmed. Costs are awarded to respondents Farmers Group, Inc. and Farmers Insurance Exchange.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J.

We concur:

BIGELOW, P. J

WILEY, J.